

**THE COMMONWEALTH OF MASSACHUSETTS**  
Public Employee Retirement Administration Commission  
John W. McCormack Building, Room 1101  
One Ashburton Place, Boston, MA 02108  
(617) 727-9380

MEMORANDUM

TO: All Retirement Boards

FROM: Robert F. Stalnaker

RE: Proposed Disability Regulations

DATE: March 20, 1998

Enclosed for your review is a copy of the proposed regulations relative to disability retirement, which have been filed with the Office of the Secretary of State, in accordance with G.L. c.30A. Please note that a series of public hearings will be held on the following dates and locations:

- **April 2, 1998 at Springfield Community College in Scibelli Hall, Room 703/704, Springfield, MA**
- **April 6, 1998 at Worcester City Hall, City Council Chambers, Worcester, MA and**
- **April 9, 1998 at the John W. McCormack Building, One Ashburton Place, Boston, MA in Conference Rooms 1 & 2, located on the 21<sup>st</sup> Floor**

All hearings will commence at 10:00 a.m. You are encouraged to attend and participate at all or any of these hearings. The Commission will accept written comments regarding the proposed regulations through April 20, 1998. Comments may be sent to the Commission at Room 1101, McCormack Building, One Ashburton Place, Boston, MA 02108.

## 840 CMR 10.00: STANDARD RULES FOR DISABILITY RETIREMENT

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840 CMR 10.00 is the standard rules for disability retirement promulgated by the Public Employee Retirement Administration Commission under the authority of M.G.L. c. 7, s. 50 and M.G.L. c. 32, ss. 6 and 21. Except as may otherwise be provided by the Commission, or by supplementary rules of a particular retirement board approved by the Commission, 840 CMR 10.00 shall govern the following disability proceedings and procedures commenced by or before any retirement board after INSERT EFFECTIVE DATE OF REGULATIONS

- (1) Proceedings for ordinary and accidental disability retirement;
- (2) Proceedings for restoration to active service of members retired for disability;

- (3) Proceedings for modification of the retirement allowance of members retired for disability;
- (4) Procedures for medical examinations by medical panels on applications for disability retirement;
- (5) Procedures for re-examination, -evaluation and rehabilitation of members retired for disability; and
- (6) Procedures for annual reporting of earnings and refunds under M.G.L. c. 32, s. 91A by members retired for disability.

#### **840-10.01: Definitions**

Unless a different meaning is plainly required by the context, words and phrases used in 840 CMR 10.00 shall have the meanings assigned them by M.G.L. c. 32 and if no meaning is so assigned, they shall have their ordinary meanings.

#### **840-10.02: Purpose of Standard Rules: Retirement Board Policy**

The purpose of 840 CMR 10.00 is to establish uniform standards and procedures to be applied by retirement boards in ordinary and accidental disability retirement proceedings and procedures under M.G.L. c. 32, ss. 6, 7, 8 and 91A. It shall be the policy of the retirement board to make every reasonable effort to assist retirement system members to exercise all rights and obtain all benefits authorized by the laws governing ordinary and accidental disability retirement, while protecting the retirement system and the public against claims and payments for disability retirement not authorized by law.

#### **840-10.03: Supplementary Rules: Approval by Commission**

Any retirement board may promulgate supplementary rules for disability retirement but supplementary rules shall be consistent with 840 CMR 10.00, shall conform to the standard for decision set forth in 840 CMR 10.04 and shall take effect only as approved by the Commission pursuant to 840 CMR 14.02.

#### **840-10.04: Standard For Decision, Findings of Fact**

- (1) No retirement for ordinary or accidental disability shall be allowed unless the retirement board, based upon substantial evidence, makes findings of the facts upon which it relied in making its decision. The board must find that:
  - (a) The member is unable to perform the essential duties of his position; and
  - (b) The inability is likely to be permanent; and

(c) If the application is for accidental disability retirement, that the incapacity is the natural and proximate result of a personal injury sustained or hazard undergone while in the performance of the member's duties at some definite place and some definite time without serious and willful misconduct on the member's part; and

(d) The member should be retired.

(2) In making the finding required by 840 CMR 10.04(1)(b) the retirement board shall consider, but not be limited to, the following factors:

(a) Whether the nature of the condition or injury is such that it can be expected to improve over a reasonable period of time; (b) Whether the nature of the condition or injury is such that it could be expected to improve if the member were willing to undergo reasonable medical treatment or rehabilitation.

(3) In making the finding required by 840 CMR 10.04(1)(c) the retirement board shall apply the following presumptions:

(a) The retirement board shall presume that any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death to a member as described in M.G.L. c. 32, s. 94 was suffered in the line of duty unless the contrary is shown by competent evidence.

(b) The retirement board shall presume that any condition of impairment of health caused by any disease of the lungs or respiratory tract, resulting in total disability or death to a member described in M.G.L. c. 32, s. 94A was suffered in the line of duty, as a result of the inhalation of noxious fumes or poisonous gases, unless the contrary is shown by competent evidence.

(c) The retirement board shall presume that any condition of cancer affecting the skin or central nervous system, lymphatic, digestive, hematological, urinary, skeletal, oral or prostate systems, or lung or respiratory tract resulting in disability or death to a member described in M.G.L. c. 32, s. 94B was suffered in the line of duty unless it is shown by a preponderance of the evidence that non-service connected risk factors or non-service connected accidents or hazards undergone caused such incapacity.

(4) In making the finding required by 840 CMR 10.04(1)(c) the retirement board shall determine:

(a) Whether the presumptions set forth in 840 CMR 10.04(4)(a), (b) or (c) apply. If one of the presumptions applies to the application:

- (i) Whether the applicant successfully passed a physical examination upon entry to service or subsequent thereto which failed to reveal any evidence of such condition; and
- (ii) Whether in the line of duty an applicant claiming the presumption contained in M.G.L. c. 32, s. 94A responded to calls that would have involved the inhalation of or exposure to noxious fumes or poisonous gasses; and
- (iii) Whether an applicant claiming the presumption contained in M.G.L. c. 32, s. 94B served in a position that renders him or her eligible for the application of the presumption for at least five years and regularly responded to calls of fire during some portion of his or her service; and

(iv) Whether an applicant who left active service and is claiming the presumption contained in M.G.L. c. 32, s. 94B first discovered the condition for which retirement is sought within five years of the last date that he or she actively served in a position described in M.G.L. c. 32, s. 94B.

(v) Whether any contrary evidence is sufficient to overcome the applicable presumption

(b) Whether other causal factors related to the member's physical or mental condition might have contributed to the disability claimed; and

(c) Whether any event other than the accident or hazard upon which the disability retirement is claimed might have contributed to the disability claimed.

#### **840-10.05: Proceedings; Parties; Representation; Record**

(1) Proceedings. Disability proceedings include proceedings:

(a) For ordinary and accidental disability retirement of members in service;

(b) For rehabilitation of members retired for disability;

(c) For restoration to active service of members retired for disability; and

(d) For modification of the retirement allowance of members retired for disability.

(2) Parties. Parties to a proceeding for ordinary or accidental disability retirement include the member who files the application and the member's employer or. If the application is filed by a department head, the department head and the member who is the subject of the application shall be parties to the application. The party to a proceeding for modification of the retirement allowance of a member retired for disability is the member who is the subject of the proceeding. Parties to a proceeding for restoration to active service of a member retired for disability include the retired member, the member's employer and the head of any department identified by the employer as a department in which a vacancy exists to which the member may be restored under M.G.L. c. 32, s. 8(2). Any person authorized by the retirement board to intervene or otherwise authorized by law to participate as a party in any proceeding shall be a party to that proceeding for purposes of 840 CMR 10.00.

(3) Representation. A party may appear in his or her own behalf or may be accompanied, represented and advised by an authorized representative who may be an attorney, legal guardian or other person authorized to represent the party in the proceedings. Any authorized representative shall file with the retirement board a written appearance which shall contain the representative's name, address and telephone number and the name of the party represented.

(4) Record. All evidence, whether documentary, testimonial, or in other form, offered by a party, the retirement board or any other person or entity in a disability proceeding and any issue, contention or argument raised with respect thereto, shall be included in the record of the proceeding.

#### **840-10.06: Proceedings for Ordinary or Accidental Disability Retirement; Applications; Additional Information**

Proceedings for ordinary or accidental disability retirement may be brought by filing an application with the retirement board and with the employer. The application shall consist of the forms prescribed by 840 CMR 10.06, and shall be considered filed as of the date upon which the applicant completes and submits all the required forms to the retirement board.. If the retirement board or the Commission believes any part of the application contains false, fictitious or fraudulent information, the board or the Commission shall notify the Attorney General or the appropriate district attorney.

(1) Voluntary Retirement. Any member in service who becomes totally and permanently unable to perform the essential duties of his or her job under the circumstances described in M.G.L. c. 32, s. 6 (relating to ordinary disability) or s. 7 (relating to accidental disability) may file an application for retirement on Form 10-1. Every member-applicant shall also file:

(a) A sworn statement on Form 10-1 indicating the members intent to retire;

(b) A certificate on Form 10-2 from a licensed medical doctor;

(c) A written statement on Form 10-6(3), authorizing release of information from the Federal Internal Revenue Service and the Department of Revenue relative to the annual gross earned income of the member in accordance with M.G.L. c. 32, ss. 6(1) and 7(1);

(d) If the application is for accidental disability retirement, a sworn statement on Form 10-3 of the circumstances of the event or hazard undergone from which the personal injury was sustained upon which the disability retirement allowance is claimed;

(e) The member's sworn statement, on Form 10-4, of the member's duties of employment and the specific duties the member is now unable to perform as a result of the disability claimed;

(f) A statement, on Form 10-5, of the member's education and training, employment history and off-duty physical activities;

(g) Authorizations, on Form 10-6(1) or 10-6(2) or on such other form as may be required by a person, institution or other agency having custody of the member's records, for release of medical or insurance records relating to the member as follows:

1. records of the member's personal physicians and of the physician submitting the certificate described in 840 CMR 10.06(1)(b);

2. records of all physicians or medical institutions examining or treating the member for the condition or personal injury upon which the application is based;

3. records of all physical examinations performed within the five (5) year period prior to the application or, if none are available for that period, the most recent;

4. the member's workers' compensation records or, if applicable, any records in connection with application for or receipt of benefits pursuant to G.L. c. 41, s. 111F;

5. the member's medical records for the last five (5) years;

6. the accident or claim reports for the last five (5) years of any insurer in connection with the personal injury sustained or the hazard undergone upon which the application is based;

- (h) Authorizations permitting the physicians and medical institutions described in 840 CMR 10.06(1)(g)2 to further explain the records, treatment performed, or statement or prognosis.
- (2) Involuntary Retirement. The department head of any member in service who becomes totally and permanently unable to perform the essential duties of his or her job under the circumstances described in M.G.L. c. 32, s. 6 (relating to ordinary disability) or s. 7 (relating to accidental disability) may file an application for retirement on Form 10-2A. Department head applicants shall also file the statements by the department head or employer (Form 10-7) described in 840 CMR 10.07 and any medical information available to the department head or employer on which the application is based.

#### **840-10.07: Information to be Obtained From Member's Department Head or Employer**

Except as provided in 840 CMR 10.09, upon receipt of an application by a member for ordinary or accidental disability retirement, the retirement board shall request the statements required by 840 CMR 10.07 from the member's department head or employer. If the department head does not supervise the member, the department head's statement required by 840 CMR 10.07(1) shall be prepared by the member's direct supervisor and shall be counter-signed by the department head. The department head's statement shall be filed with the retirement board within fifteen days of the date that the department head receives it.

(1) Department Head's or Employer's Statement. The retirement board shall request a statement from the member's department head or employer on Form 10-7

- (a) Providing a job description for the member's job and describing the member's principle duties and responsibilities; and
- (b) Identifying the essential duties of the position; and
- (c) Describing any particular physical or mental requirements prescribed for the position;
- (d) Providing any medical records in the member's personnel file relating to the member's physical condition at the time of the member's employment or thereafter, which shall include any record of a pre-employment physical, any record relating to in-service physical examinations and all medical records relating to the disability claimed;
- (e) Providing any records of the member's education and training or of the member's qualifications;
- (f) Describing the specific duties the member cannot or may not be able to perform as a result of the disability or incapacity claimed;
- (g) Stating whether, in the department head's or employer's opinion the member may be able to perform the essential duties of the member's job.
- (h) If the application is for an accidental disability retirement, describing the event, accident or hazard undergone upon which the disability is being claimed, attaching copies of any and all injury or incident reports, and providing any other information which may bear upon the cause of the member's claimed disability;
- (i) Stating whether the position is classified under civil service;

(j) Stating whether the member's claimed disability is a result of any misconduct on the part of the member.

#### **840 10.08 Medical Panel, Formation and Instruction to Panel**

(1) Except as provided in 840 CMR 10.09, upon receiving an application for disability retirement, the retirement board shall petition the Commission to schedule a medical examination of the member by a regional medical panel.

(2) If a medical panel is requested by the retirement board as a result of a decision of the Division of Administrative Law Appeals or the Contributory Retirement Appeal Board a copy of the decision must be forwarded to the Commission along with the medical panel request form.

(3) Such regional medical panel shall consist of three physicians who shall not be associated as defined in M.G.L. c. 32, s. 6(3), who shall be selected for the purpose of examining the member whose retirement is under consideration and shall, so far as practicable, be skilled in the particular branch of medicine or surgery involved in the case. The Commission shall appoint one of the three physicians as Medical Panel Coordinator to facilitate panel proceedings.

(4) Such regional medical panel shall meet within sixty days after appointment by the Commission to conduct its examination. If the panel fails to meet within sixty days, the Commission shall require the three physicians to conduct such examinations separately. If the Commission determines that it is unlikely the medical panel will be able to meet within sixty (60) days, the Commission may, with the written consent of the member, authorize separate examinations.

(5) Upon request of a member, the Commission shall schedule separate examinations as soon as practicable thereafter. A request for separate examinations may be filed at any time. A request for separate examinations will not ordinarily be considered, however, if received by the Commission less than 48 hours prior to a scheduled examination by a regional medical panel unless the request is filed pursuant to the provisions of 840 CMR 10.10(5). The Commission shall so far as practicable schedule separate examinations with the same three physicians who were appointed to the regional medical panel unless the request is filed pursuant to the provisions of 840 CMR 10.10(5).

(6) Upon designation of the regional medical panel, the retirement board shall send to each panel physician, prior to the examination, all information obtained pursuant to 840 CMR 10.09 (1), and a letter on Form 10-10, notifying the panel of the availability and location of any other medical data or reports known to the retirement board. The retirement board shall also provide the medical panel with copies of all documents in the member's file that may be of assistance to the panel, including, without limitation, the following:

(a) The statement of the member's physician on Form 10-2;

(b) The member's statement of duties on Form 10-4;

(c) The member's statement of background, qualifications and physical activities on Form 10-5

- (d) The department head's or employer's statement on Form 10-7;
  - (e) For accidental disability claims, the member's statement of circumstances of personal injury or hazard undergone on Form 10-3;
  - (f) For accidental disability claims, copies of any injury reports filed with the retirement board or the applicant's employer.
- (7) The medical panel shall not be provided with copies of the certificates and narratives of medical panels which previously examined the member or with copies of decisions by the Division of Administrative Law Appeals or the Contributory Retirement Appeal Board involving the member.
- (8) The applicant shall be responsible for providing X-Rays, EKG tracings and other records that cannot readily be photocopied to the Medical Panel Coordinator designated by the Commission who shall forward such information to the other two panel physicians. The applicant is responsible for making the necessary arrangements for the return of these materials to the proper facility or treating physician.

#### **840-10.09: Investigation of Facts; Denial of Certain Applications; Appeal**

- (1) The retirement board shall obtain any pertinent information known to exist without regard to the five (5) year time periods stated in 840 CMR 10.06(1)(g)(3), (5) and (6), including any record listed in 840 CMR 10.06(1)(g) relating to an application for ordinary or accidental disability retirement and shall conduct such investigation as may be necessary to determine the facts.
- (2) At any stage of a proceeding on an ordinary or accidental disability retirement application the retirement board may terminate the proceeding and deny the application if it determines that the member cannot be retired as a matter of law.
- (3) If the retirement board decides to deny an application under 840 CMR 10.09, notice of the decision, basis for the board's decision, and right to appeal shall be sent to all parties as provided by 840 CMR 10.13(3).

#### **840-10.10: Examination by Medical Panel**

- (1) Notice. In proceedings for disability retirement the Commission shall give all parties at least fourteen (14) days notice of the medical panel examination. An applicant may waive his or her right to fourteen (14) days notice by filing a written waiver with the Commission. Examinations shall be held at a reasonably convenient time and place for all parties.
- (2) Examination. A physical examination and/or psychiatric evaluation of the member shall be conducted by the regional medical panel. If fewer than three physicians are present at a regional medical panel examination, and the member consents in writing, the physician or physicians present shall conduct the examination and any physicians not present shall conduct a separate examination.
- (3) Medical Tests. The medical panel may suggest any "non-invasive" medical test which the panel considers necessary to render an opinion of the member's medical condition.

The Commission shall assume the cost of any non-invasive test suggested by the medical panel up to an amount that the Commission shall determine annually. This annual determination will be communicated to all retirement boards during the month of January. No test the cost of which exceeds the annual amount determined by the Commission shall be ordered or required by the medical panel without the advance approval of the Commission.

(4) Representation. At the election of the member and employer respectively, the member's physician and employer's physician, may be present and may answer questions from the panel during the decision making process of the panel. In the case of separate examinations, the member's physician and the employer's physician shall have the opportunity to attend each examination. Either physician may disagree with the findings of the panel or, in the case of separate examinations, with any of the three (3) physicians and may so indicate by signing the panel certificate in the space provided and by filing a written statement with the Commission within 10 days following the examination. Neither physician shall otherwise participate in the decision making process of the panel.

(5) Rescheduling of Examination. If a member is unable to attend a scheduled medical panel examination, or in the case of single exams any one of the three separate examinations, the member shall notify the Commission and may request that the examination be rescheduled. The Commission will ordinarily grant requests for rescheduling only for extenuating circumstances such as death in the family or hospitalization or serious illness of the member, provided that appropriate documentation of such is provided to the Commission. If a request for rescheduling is denied by the Commission, and the applicant fails to appear at the originally scheduled examination, the retirement board may deny the application and notice of the decision and right to appeal shall be sent to all parties as provided by 840 CMR 10.13(3)

(6) Failure to Appear. If a member fails to appear at a scheduled examination without having been granted a request for rescheduling by the Commission, the member shall reimburse the Commission for the costs of that examination before a new examination shall be scheduled. If the application is for involuntary retirement under the provisions of M.G.L. c. 32, s. 16, the employer shall be responsible for reimbursement to the Commission if the employee fails to appear at a scheduled examination. Reimbursement may be waived if the Commission finds that there was just cause for the member's failure to appear.

(7) Confidentiality. Since the principal purpose of the examination is to discuss and evaluate the physical condition or mental health of the member, attendance at the examination shall be limited to the member and the medical panel physician(s), the employee's physician and the employer's physician. The member's attorney and the employer's attorney may attend the examination. The member may permit the presence of other individuals, provided that their presence will not disrupt the examination. No document received during the examination shall be made available to the public except as may be required by other laws and regulations applicable to such records.

(8) Certification of Panel Findings. The medical panel, or in the case of separate examinations each medical panel physician, shall report their findings and

recommendations to the retirement board through the Commission on certificates supplied by the Commission within sixty (60) days after completing their examinations. The panel or physician, as the case may be, shall forward the report to the Commission for approval for payment of medical panel services. Within five (5) days of receiving a properly completed medical panel or physician report, the Commission shall forward the report to the retirement board. The medical panel physicians shall certify on Form 10-11 (Certificate of Medical Panel) whether the member is unable to perform the essential duties of his job, whether the inability is likely to be permanent and, if the application is for accidental disability, whether the disability is such as might be the natural and proximate result of the accident or hazard undergone on account of which the retirement is claimed. The physician designated by the Commission as Medical Panel Coordinator or, in the case of separate examinations, each medical panel physician, shall also file a narrative statement describing in detail the findings and recommendations of the report. The names and addresses of all persons attending the medical panel examination, a listing of all documents presented to the medical panel at the examination and all medical tests and/or X-Rays ordered by the medical panel shall be listed in the space provided on the Medical Panel Certificate.

**840-10.11: Notice of Medical Panel Findings; Further Examination by Medical Panel; Denial of Application; When Hearing Shall be held by the Retirement Board**

- (1) Within thirty (30) days of receipt of a medical panel report by the retirement board or, in the case of separate examinations, thirty (30) days of receipt of the last of the three separate reports, the retirement board shall notify the parties of the panel's findings, and provide the member with a copy of all certificates and documents completed by the medical panel physicians.
- (2) If upon review of a medical panel report by the retirement board, or in the case of separate examinations, any individual report, the retirement board determines that additional information or further clarification is needed from the medical panel, the board shall request such information from the medical panel and shall provide a copy of such request to the Commission. At the request of the retirement board, the Commission shall assist the retirement board in obtaining whatever information is deemed necessary.
- (3) If the medical panel findings preclude retirement for the disability claimed, the retirement board shall either deny the application or, if it determines that further examination by a medical panel may be warranted, the retirement board shall petition the Commission to schedule a new examination by a medical panel, stating the circumstances warranting a new examination. If the Commission grants a request for a new medical panel, the retirement board shall proceed as provided in 840 CMR 10.08(6). If the Commission declines to schedule a new examination, it shall so notify the retirement board and the retirement board shall deny the application. Notice of the decision and right to appeal shall be sent to all parties as provided by 840 CMR 10.13(3).
- (4) If the medical panel findings permit retirement for the disability claimed, the retirement board shall determine whether or not to approve the application. A hearing may be held on any

disability retirement application and shall be held upon request of the member. The retirement board shall hold a hearing on any involuntary disability retirement application where a hearing is timely requested by the member. If a hearing is held notice shall be given and the hearing shall be held as provided in 840 CMR 10.12.

#### **840-10.12: Hearing by Retirement Board**

(1) Notice. The retirement board shall give all parties at least thirty (30) days notice of the time and place for the hearing and of the issues involved in the hearing. If the issues cannot be fully stated in advance of the hearing, they shall be fully stated as soon as practicable. In all cases of delayed statements, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all parties reasonable opportunity to prepare and present evidence and argument respecting the issues.

(2) Discovery. Any party and any authorized representative shall, at any time after a hearing has been requested or ordered and after reasonable notice to the retirement board, be permitted to examine and copy or photocopy, at cost and during normal business hours, any document in the case file pertaining to the member's file or the record of the hearing. All other discovery shall be at the discretion of the retirement board. A request for discovery may be made by any party at any time after a hearing has been requested or ordered.

(3) Conduct of Hearing. Hearings shall be conducted in an informal manner that affords all parties an opportunity to present all information and argument relevant to the proceeding.

(a) Presiding Officer. The chairperson of the retirement board, any other member of the board acting as chairperson, or any individual designated by the board, shall be the presiding officer and shall assure parties the right to call and question witnesses and introduce exhibits, and to present argument, relevant to the proceeding. The presiding officer shall assure an orderly presentation of the evidence and argument and that a record is made of the hearing.

(b) Continuances. The presiding officer may change the date, time or place of the hearing on his own motion or on the request of any party, upon due notice to all other parties, and may continue the hearing to a subsequent date to permit any party to present additional evidence, witnesses or other materials. At any time prior to decision, the presiding officer may reconvene the hearing for any purpose upon ten (10) days written notice to all parties, stating therein the purposes for reconvening, and the date, time and place of the reconvened hearing.

(c) Oaths; Rulings; Briefs: The presiding officer shall administer the oath or affirmation to witnesses, shall rule upon the admissibility of evidence and upon any requests for rulings, and may order that written briefs be submitted by the parties.

(d) The Record. All proceedings in connection with the hearing shall be recorded by electronic or stenographic means and such record shall be maintained as part of the hearing record. Transcripts or duplicate tapes of the proceedings shall be supplied to any

party, upon request, at that party's expense. At the discretion of the presiding officer, any party may be permitted to maintain a record so long as this does not interfere with the conduct of the proceedings. All documents and other evidence received shall also become part of the record.

(e) Executive Session. Since the principal purpose of a hearing on a disability retirement application is to discuss and evaluate the physical condition or mental health of the member, the hearing shall be held in executive session unless the member requests that the meeting be open. In such executive session only the retirement board, the secretary and the retirement board's counsel, the parties and their authorized representatives and such other persons as the presiding officer shall deem necessary for the conduct of the hearing shall be permitted to be present. No executive session shall be held until the retirement board has first convened in open session for which notice has been given, a majority of the members of the board have voted to go into executive session and the vote of each member is recorded on a roll call vote and entered into the minutes, the presiding officer has stated the purpose for an executive session, and has stated before the executive session if the board will reconvene after the executive session. The records of the hearing in executive session shall not be made available to the public except in accordance with the board's regulations on privacy and confidentiality and such other laws or regulations as may be applicable to such records.

(f) Evidence.

1. General. The retirement board need not observe the rules of evidence observed by courts but shall observe the rules of privilege recognized by law. Evidence shall be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Unduly repetitious evidence may be excluded.

2. Testimony; Stipulations. Witnesses shall testify under oath or affirmation and shall be available for questions by all parties. If a witness cannot, as a practical matter, be available in person the witness shall be available and testify by telephone conference call, or by any other reasonable means ordered by the presiding officer. Stipulations by the parties as to any fact or as to the testimony that would be given by an absent witness may be offered and received as evidence.

3. Documentary Evidence. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference in the discretion of the presiding officer.

4. Taking Notice of Facts. The retirement board may take notice of any fact which may be judicially noticed by the courts, and any fact within the retirement board's specialized knowledge. Parties shall be notified and afforded an opportunity to contest any facts so noticed.

5. Evidence to be Part of Record. All evidence, including any records, reports and documents of the retirement board, to be considered in making a decision shall be offered and made a part of the record of the proceeding and the record shall at all times be open for inspection by any party or authorized representative during business hours. The retirement board may, with notice to all parties, require any party to submit additional

evidence for the record and shall afford parties an opportunity to submit rebuttal evidence.

(g) Subpoenas.

1. Issuance. The presiding officer shall, within five days of a written request of a party, issue a subpoena requiring the attendance and testimony of a witness or the production of any evidence including books, records, correspondence or documents relating to any matter in question at a hearing on a disability application.

2. Request to Vacate. Any person subpoenaed may file a written request requesting the presiding officer to vacate or modify the subpoena.

3. Decision on Request to Vacate or Modify Subpoena. The presiding officer shall notify all parties of the request to vacate or modify the subpoena and afford parties a reasonable time to respond. The presiding officer shall grant the request to vacate or modify the subpoena if the testimony or evidence subpoenaed does not relate with reasonable directness to any matter at issue in the proceeding or if the subpoena is otherwise unreasonable or oppressive.

(h) If any person fails to comply with a properly issued subpoena, the retirement board or the party requesting the issuance of the subpoena may petition the superior court for an order requiring compliance.

### **840-10.13: Decision**

In all disability proceedings the decision of the retirement board shall be based exclusively on the record of the hearing or, if there is no hearing, on the record of the proceeding. A written decision shall be made as soon as administratively feasible and copies of the decision shall be sent to all parties as provided in 840 CMR 10.13.

(1) Proceedings for Disability Retirement. In proceedings for disability retirement the retirement board shall determine whether the member is eligible for disability retirement under M.G.L. c. 32, ss. 6 or 7, or under another section of general or special law, and under the standard set forth in 840 CMR 10.04. In no event shall the decision be later than one hundred and eighty (180) days after the application for disability retirement is filed unless an extension is granted by the Commission under M.G.L. c. 32, s. 6(4) or s. 7(4).

(a) Decision to Grant Application: Information to be Sent to Commission.

If the retirement board decides to grant an application for disability retirement, a copy of the decision shall be sent to the Commission on Form 10-12 together with a statement of the facts found by the retirement board and all of the documentary evidence in the record that may be of assistance to the Commission including, without limitation, the following:

- i. The certificate(s) of the medical panel, including any and all correspondence from the medical panel;
- ii. The certificate of the applicant's physician;
- iii. All descriptions of the accident, if the application is for accidental disability;
- iv. All descriptions of the member's duties;
- v. All documents prepared by the member in connection with the application;

- vi. All documents prepared by the employer in connection with the application;
  - vii. All documents prepared by the retirement board in connection with the application.
- (b) Decision to Deny Application. If the retirement board decides to deny an application for disability retirement the board shall notify the Commission and notice of the decision and right to appeal shall be sent to all parties as provided by 840 CMR 10.13(3).
- (2) Decision to Restore a Member Who Was Retired for Disability to Active Service.
- (a) If within two years of retirement a medical panel convened pursuant to M.G.L. c. 32, s. 8 finds that the member is qualified for and able to perform the essential duties of the position from which he or she retired or a similar position within the same department, as determined by the State Human Resources Division, the retirement board shall notify the member, the employer and the State Human Resources Division of the medical panel's determination. If a vacancy exists, the member shall be restored to active service in the position from which he or she retired. If the retired member is able to perform the essential duties of a similar job within the same department for which he or she is qualified, as determined by the State Human Resources Division, and such position is vacant, said member shall return to such position.
- (b) If after two years from the date of retirement a medical panel determines that the disability retiree is qualified for and able to perform the essential duties of the position from which he or she retired or a similar position within the same department, as determined by the State Human Resources Division, the member shall be returned to said position, provided the position is vacant. The retirement board shall notify the member, the employer and the State Human Resources Division of the panel's determination. If the position has been filled, the member shall be granted a preference for the next available position or similar position for which he is so qualified.
- (c) If a retiree is found able to return to his or her position as provided in (a) or (b) above, and if no vacancy exists in the same or in a similar position, the retiree shall continue to receive his or her retirement allowance until reinstatement takes place or until the member's pension is reduced or revoked as a result of the submission of earnings information under section ninety-one A.
- (3) Notice of Decision; Appeal.
- (a) If the retirement board decides to deny an application for disability retirement or decides not to restore a disability retiree to active service or if a disability retiree is to be restored to active service, notice of the decision shall be sent to all parties within three (3) days of the decision. In proceedings for disability retirement the notice shall be on Form 10-9.
- (b) A copy of M.G.L. c. 32, ss. 16(3) and (4) shall be included with the notice of decision and, upon request, the retirement board shall advise and assist the applicant or retired member, as the case may be, in the filing of an appeal.

**840-10.14: Annual Statement of Earnings; Refunds and Modifications based on Earnings Information.**

(1) The retirement board shall provide such information as the Commission shall require to assist it in performing its responsibilities pursuant to G.L. c. 32, ss. 91A and 91B. (

(2) Upon receipt of notice from the Commission that a disability retiree has failed to file the Annual Statement of Earnings required by G.L. 32, s. 91A, the retirement board shall review all information received and shall suspend the member's rights in and to the disability retirement allowance until the member has complied with the reporting requirements under G.L. 32, s. 91A. Prior to any suspension of benefits, the member shall be given a written notice and an opportunity to be heard by the retirement board and, upon such termination or reduction of benefits, shall have the right to appeal such action to the Contributory Retirement Appeal Board.

(3) Upon receipt of notice from the Commission that a disability retiree has had earnings in excess of the amount allowed by G.L. 32, s. 91A, the board shall request the member to refund the retirement allowance for that year or a portion thereof equal to such excess, as the case may be. Initial notice of a request for refund shall include the calculation on which the request is based and shall state that the member may, within fifteen (15) days, file a written request for a hearing to show cause why the disability retirement allowances should not be suspended or terminated or why no refund is due. If a retiree files a request for hearing, such hearing shall be held within thirty (30) days of such request for hearing. The board shall notify the member of its decision, including a final request for refund, if any, within thirty (30) days of the hearing.. If the member is to be required to refund an amount to the board, the notice of the board's decision shall include notification that the member's allowance shall be withheld until the refund is made. The member shall also be notified that if the refund is not made, payment of the retirement allowance shall be resumed only when the amounts withheld are sufficient to pay the amount of the refund. A copy of M.G.L. c. 32, s. 16(4) shall be included with the notice of decision and, upon request, the retirement board shall advise and assist the applicant or retired member, as the case may be, in the filing of an appeal.

#### **840 10.16: Examination of a Member Previously Retired for Disability**

(1) If after an evaluation pursuant to M.G.L. c. 32, s. 8 it is determined that a retired member is able to perform the essential duties of the position from which he or she retired or a similar job within the same department for which he or she is qualified without a medical or vocational rehabilitation program, or after the completion of a rehabilitation program as provided in 840 CMR 10.20, the Commission shall appoint a medical panel to examine the member to determine the scope of the member's mental physical capabilities and whether the member is able to perform the essential duties of his job or the essential duties of a similar job within the same department given the member's condition.

(2) The Commission shall appoint a panel to consist of a single physician or a three member medical panel. If a three member panel is appointed, the physicians need not examine the member at the same time and place. The panel shall consist of a physician skilled in the particular branch of medicine or surgery that would encompass the

condition for which the member retired and such other physicians as the Commission determines necessary to determine the scope of the member's capabilities and whether the member is able to perform the essential duties of his or her job or the essential duties of a similar job within the same department given the member's condition

(3) The Commission shall give the member, the employer and the retirement board at least fourteen (14) days notice of the medical panel examination. An applicant may waive his or her right to fourteen (14) days notice by filing a written waiver with the Commission. Examinations shall be held at a reasonably convenient time and place for all parties.

(4) Medical Tests. The medical panel may suggest any "non-invasive" medical test which the panel considers necessary to render an opinion of the member's medical condition. The Commission shall assume the cost of any non-invasive test suggested by the medical panel up to an amount that the Commission shall determine annually. This annual determination will be communicated to all retirement boards during the month of January. No test the cost of which exceeds the annual amount determined by the Commission shall be ordered or required by the medical panel without the advance approval of the Commission.

(5) At the election of the member and employer, the member's physician and employer's physician, may be present and may answer questions from the panel during the decision making process of the panel. Neither physician shall otherwise participate in the decision making process of the panel.

(6) If a member is unable to attend any scheduled medical panel examination the member shall notify the Commission and may request that the examination be rescheduled. The Commission will ordinarily grant requests for rescheduling only for extenuating circumstances such as death in the family or hospitalization or serious illness of the member, provided that appropriate documentation of such is provided to the Commission. If a request for rescheduling is denied by the Commission, and the applicant fails to appear at the scheduled examination, the member shall reimburse the Commission for the costs of that examination. Reimbursement may be waived if the Commission finds that there was just cause for the member's failure to appear.

(7) Confidentiality Since the principal purpose of the examination is to discuss and evaluate the physical condition or mental health of the member, attendance at the examination shall be limited to the member and the medical panel physician(s), the employee's physician and the employer's physician. The member's attorney and the employer's attorney may attend the examination. The member may permit the presence of other individuals, provided that their presence will not disrupt the examination. No document received during the examination shall be made available to the public except as may be required by other laws and regulations applicable to such records.

(8) Certification of Panel Findings. The medical panel shall report its findings and recommendations to the Commission on certificates supplied by the Commission within sixty (60) days after completing the examinations. Within five (5) days of receiving a properly completed medical panel or physician report, the Commission shall forward the report to the retirement board for appropriate action.

**840-10.17:**

**840-10.18: Restoration to Active Service of a Member Retired for Disability**

- (1) If within two years of retirement a medical panel determines that a disability retiree is able to perform the essential duties of the position from which he or she retired, the retirement board shall begin proceedings to restore the member to active service. The board shall notify the State Human Resources Division of the panel's determination. The retirement board shall notify the member of the proceedings on Form 10-21 and shall send a copy of the notice to the Commission. The board shall notify the employer and the department head of the department from which the member was retired of the proceedings on Form 10-22 and advise them that if the retired member is able to perform the essential duties the same position or of a similar position within the same department for which he or she is qualified, as determined by the State Human Resources Division, and such position is vacant, the member is to be returned to such position.
- (2) If after two years from the date of retirement a medical panel determines that the disability retiree is qualified for and able to perform the essential duties of the position from which he or she retired or a similar position within the same department, as determined by the State Human Resources Division, the retirement board shall begin proceedings to restore the member to active service. The board shall notify the State Human Resources Division of the panel's determination. The retirement board shall notify the member of the proceedings on Form 10-21 and shall send a copy of the notice to the Commission. The board shall notify the employer and the department head of the department from which the member was retired of the proceedings on Form 10-22 and advise them that if the retired member is able to perform the essential duties of the same position or of a similar position within the same department for which he or she is qualified, as determined by the State Human Resources Division, and such position is vacant, the member is to be returned to such position. If the position has been filled, the member shall be granted a preference for the next available position or similar position for which he or she is qualified.
- (3) If a retiree is found able to return to his or her position as provided in (1) or (2) above, and if no vacancy exists in the same or in a similar position, the retiree shall continue to receive his or her retirement allowance until reinstatement takes place or until the member's pension is reduced or revoked as a result of the submission of earnings information under section ninety-one A.
- (4) The retirement board shall give all parties notice of proceedings to restore a member to active service or to modify a member's retirement allowance on Form 10-21.
- (5) Any member may request a hearing on proceedings to restore the member to active service by filing a written request with the board within fifteen (15) days of the date of

notice (on Form 10-21) of the proceedings. The retirement board shall hold a hearing if timely requested and may hold a hearing on its own motion. Hearing procedure shall be as provided by 840 CMR 10.12 and any decision shall be deferred until conclusion of any hearing held.

(6) If the member refuses to return to service or to file such information as the Commission or retirement board shall require, the retirement board shall suspend the member's retirement allowance.

(7) If any member is restored to active service his retirement allowance shall cease, and the member shall again become a member in service and regular deductions shall again be made from regular compensation.

(8) Any creditable service in effect at the time of the member's retirement for disability shall thereupon be restored to full force and effect and, upon subsequent retirement, the member shall be entitled to a normal yearly retirement allowance computed as though such disability retirement had not taken place. No additional contributions shall be required as a condition for receiving such creditable service. The amount of creditable service to be granted for the period during which the member received a disability retirement allowance shall be based on the average amount of creditable service earned by the member for the twenty-four months immediately preceding the last day for which the member received regular compensation.

#### **840-10.19: Modification of Retirement Allowance and Fair Amount of Outside Earnings and Potential Earnings Pursuant to M.G.L. c. 32, s. 8(3)**

(1) For purposes of this regulation, "regular compensation" means, regular compensation which would have been payable during the preceding year had the member continued in service in the grade held by him at the time he was retired.

(2). For purposes of this regulation, "potential earnings" shall mean:

a) For a disability retiree who has been found able to return to his position, the amount that would have been received had he or she been reinstated to active service.

b) For a disability retiree who has completed a rehabilitation program, an amount that the member can potentially earn will be determined as a part of the rehabilitation program, after consideration of a disability retiree's functional capacity, age, education, and experience.

(3) The Commission shall review all medical panel reports filed with respect to disability retirees, all earnings information submitted under M.G.L. c. 32, s. 91A, and all reports submitted as the result of the completion of a rehabilitation program.

(4) If the Commission finds that:

(a) a retired member is engaged or is able to engage in gainful occupation, and

(b) that the annual rate of his actual or potential earnings is less than his regular compensation as defined in this subdivision, but is more than the difference between such regular compensation plus the sum of five thousand dollars, and the normal yearly amount of his retirement allowance,

the yearly amount of his pension shall be reduced, and if his actual or potential earnings are more than such regular compensation, his pension shall be suspended.

(5) If the Commission finds that a member has submitted earnings information pursuant to G.L. c. 32, s. 91A indicating earnings in excess of regular compensation as defined by this regulation, the member's pension shall be reduced or suspended and shall not be reinstated or increased for a period of one year unless a report of a medical panel finds that the mental or physical condition of such member has deteriorated. If the annual rate of his earnings should later be changed, the yearly amount of his pension shall be further modified by reinstating, increasing, reducing, or suspending it, as the case may be.

(6) For purposes of this regulation and G.L. c. 32, s. 8(3) the fair amount that a member retired for disability pursuant to section six or seven may earn or may potentially earn shall be annually adjusted for inflation. To accomplish this, the Commission will determine the increase in the consumer price index in the same manner as determined for purposes of M.G.L. c. 32, s. 102 and shall increase by that amount the five thousand dollars referred to in 840 CMR 10.18(4) of this regulation to be used in calculating the modification of a disability retiree's allowance pursuant to G.L. c. 32, s. 8(3). Each year the Commission will issue an advisory to the retirement boards that will identify the increase for the following year and describe the method used to arrive at the increase. Any increases applied to the five thousand dollars shall be permanent and any future increases will be applied to the permanent amount from the prior year.

#### **840 10.20: Evaluation For Rehabilitation Pursuant to M.G.L. c. 32, s. 8(1)(a)**

(1) The Commission, may require any member retired for disability under the provisions of sections six and seven to participate in an evaluation to determine whether the member is able to perform the essential duties of the position from which he retired or a similar job within the same department for which he is qualified without a medical or vocational rehabilitation program, or whether such member's return to his former or similar job within the same department would likely be expedited by participation in a medical or vocational rehabilitation program. The retirement board shall provide such information as the Commission shall require to assist it in determining whether a member shall be required to participate in a rehabilitation evaluation.

(2) The Commission may require an evaluation once per year during the first two year period next succeeding the date of retirement and once in each three year period thereafter, or at any time upon the written request by any disability retiree. The Commission may excuse a member from an evaluation if it determines that such examination is unwarranted based on the catastrophic nature of the member's illness or injury. Any such determination must be in writing. No member will be evaluated more frequently than once in any twelve month period.

(3) If the Commission determines that a retiree's return to active service might be expedited by participation in a medical or physical rehabilitation program, the retiree will be required to participate in a rehabilitation evaluation. The Commission shall schedule

an appointment or appointments with rehabilitation evaluation specialists. The member shall be given fourteen (14) days notice of the time(s) and place(s) of the evaluation(s). Notice shall also be given to the retirement board.

(4) A rehabilitation evaluation shall include mental or physical examinations, vocational testing, meetings, and consultations with medical professionals, including the member's treating physician and vocational rehabilitation counselors as determined necessary by the rehabilitation evaluation specialist

(5) If a retired member refuses, without good cause to submit to any evaluation, the Commission shall notify the appropriate retirement board and his rights in and to the pension provided for in section six and seven shall promptly be terminated by the board. The member shall first be given written notice and an opportunity to be heard by the board with respect to such termination.

#### **840-10.21: Rehabilitation Pursuant to G.L. c. 32, s. 8**

(1) If following a rehabilitation evaluation pursuant to 840 CMR 10.20, the Commission determines that a retired member may benefit from rehabilitation program and that such a program is cost effective, the Commission shall advise the retirement board of its determination.

(2) The board shall provide the member with a rehabilitation program consisting of services appearing on a list of services approved by the Commission. All rehabilitation programs will include a determination of the member's potential earnings, taking into account the member's functional capacity, age, education, and experience. The retirement board shall pay the costs of the program (less any amounts payable under insurance policies of the member and less any scholarships or grants otherwise available.).

(3) Any member who is unreasonably denied access to such program may appeal such denial to the Contributory Retirement Appeal Board.

(4) If a retired member fails to complete a rehabilitation program without good cause, his rights in and to the pension provided for in section six or seven shall immediately be suspended.

(5) Upon completion of the rehabilitation program the board shall ask the Commission to convene a medical panel to examine the member to determine if he or she can perform the essential duties of the position from which he or she retired.

(6) If the board believes that medical panel examination is unwarranted, the board shall file a statement of fact with the Commission, stating the reasons why the examination is unwarranted. If the Commission rejects this statement a medical panel shall be appointed to examine the member to determine the scope of the member's physical capabilities in light of the completed rehabilitation program and whether the member is able to perform the essential duties of his job or the essential duties of a similar job within the same department given the member's condition.

(7) If a member fails to appear at any required examination without good cause, all his rights in and to the retirement allowance provided for in section six or seven shall be

terminated by the board. The member shall first be given written notice and an opportunity to be heard by the board with respect to such termination.

#### **840-10.22: Rehabilitation Pursuant to G.L. c. 32, s. 21**

(1) Voluntary rehabilitation programs for disability retirees shall be developed in cooperation with the State Human Resources Division and the industrial accident board and made available to any disability retiree seeking rehabilitation.

(2) Upon receipt of a request for rehabilitation from a disability retiree, the Commission shall provide an evaluation to determine whether the member might benefit from a medical or vocational rehabilitation program approved by the Commission. The Commission may require any such member to be examined and evaluated by a physician qualified to render rehabilitation services and/or by a vocational counselor selected by the Commission. The physician and/or both shall recommend the need for and nature of any such rehabilitation program. If the Commission determines that such member might benefit from any such program, it shall so notify such member and the retirement board.

(3) The board shall provide the member with a rehabilitation program consisting of services appearing on a list approved by the Commission of public or private rehabilitation agency(ies) having rehabilitation programs suitable for such member. The member shall meet with the agency selected and shall cooperate in the design of a suitable rehabilitation program. All rehabilitation programs will include a determination of the member's potential earnings, taking into account the member's functional capacity, age, education, and experience.

(4) If the board determines that the retired member may benefit from such rehabilitation program, and that the program is reasonable in its terms and cost, the board shall approve and offer to provide and pay for such program (less any amounts payable under insurance policies of the member and less any scholarships or grants otherwise available.) The retirement board shall submit the rehabilitation program designed for the member, including detailed cost estimates, to the Commission for review.

(5) If the board determines that the retired member shall be denied access to a rehabilitation program, the board shall so advise the member in writing, detailing its reasons for the denial. The member may appeal the board's denial to the Commission. The appeal must be in writing and must be filed with the Commission within fifteen (15) days of the board's denial. The Commission shall review the matter and make its determination within sixty days of receipt of the member's appeal. If after review the Commission determines that such member might benefit from such rehabilitation program, the Commission shall approve and offer to provide and pay for such program.

(6) If the Commission approves the rehabilitation program offered by the board, the Commission shall reimburse the board for the costs of the program.

(7) The retirement allowance of a member participating in a rehabilitation program approved by the Commission shall not be reduced or modified pursuant to M.G.L. c. 32, s. 8(3) or s. 91A on account of actual or potential earnings arising out of such rehabilitation program.

### **840-10.23 Essential Duties:**

In connection with all applications for disability retirement and evaluations, re-evaluations or re-examination of disability retirees in connection with restoration to active service or participation in a rehabilitation program, a determination of the essential duties of the relevant job or position shall be made. The determination of what constitutes an essential duty of a job or position is to be made by the employer, based on all relevant facts and circumstances and after consideration of a number of factors. The employer will complete a Form 10-7 which will identify and delineate the duties the employer deems to be essential to the job or position under consideration.

The term “essential duties” as used in G.L. c. 32 and in all regulations promulgated by the Commission shall mean those duties or functions of a job or position which must necessarily be performed by an employee to accomplish the principal object(s) of the job or position. The essential duties of a position are those which bear more than a marginal relationship to the position. In making the determination as to whether a function or duty is essential, the employer shall consider and provide documentation to include, but not be limited to:

- (a) The nature of the employer’s operation and the organizational structure of the employer;
- (b) Current written job descriptions;
- (c) Whether the employer requires all employees in a particular position to be prepared to perform a specific duty;
- (d) The number of employees available, if any, among whom the performance of the job function can be distributed;
- (e) The amount of time that employees spend performing the function;
- (f) Whether the function is so highly specialized that the person in the position was hired for his or her special ability to perform the function;
- (g) The consequences of not requiring the employee to perform the function;
- (h) The actual experience of those persons who hold and have held the position or similar position; and
- (i) Collective bargaining agreements.

If the State Human Resources Division has promulgated or promulgates a list or description of essential duties for a position that is consistent with those of the member’s position, the employer shall submit such list or description as the essential duties for the position in question.

### **840-10.24: Failure to Provide Information or Documents, Violation of Regulations:**

If a member of the retirement system willfully fails to provide information or documents required by the provisions of G.L. c. 32 or by these regulations, his or her allowance may be suspended until such information or documents are provided. Failure to provide information or documents required by these regulations by any person, employer, governmental unit, retirement board, retirement board member or other entity shall be considered a violation of these regulations.

#### REGULATORY AUTHORITY

840 CMR 10.00: M.G.L. c. 7, s. 50; c. 32, ss. 6, 8 and 21.